[redacted] Term, 1988

[redacted] Dole, Secretary of Labor, *et al.*,
Petitioners

v.

[redacted] Steelworkers of America, *et al.*,
Respondents

[redacted] to the
[redacted] Court of Appeals
[redacted] Circuit

[redacted] Associated Builders
[redacted], Inc. and the
[redacted] Trade Associations

[redacted]

Maurice Baskin *
Venable, Baetjer, Howard & Civiletti
1201 Pennsylvania Avenue, N.W.
Suite 1000
Washington, D.C. 20004
(202) 962-4800
General Counsel of Respondent ABC and Counsel to Respondent CITA

[redacted]

* Counsel of Record

Dated: June 28, 1988

[redacted] Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

24

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1434

ELIZABETH DOLE, SECRETARY OF LABOR, *et al.*,
Petitioners

v.

UNITED STEELWORKERS OF AMERICA, *et al.*,
Respondents

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF OF RESPONDENTS ASSOCIATED BUILDERS AND CONTRACTORS, INC. AND THE CONSTRUCTION INDUSTRY TRADE ASSOCIATIONS

STATEMENT OF THE CASE

Respondents Associated Builders and Contractors, Inc. (ABC) and the Construction Industry Trade Associations (CITA) submit this brief on the merits in support of the position of the Petitioners, the Secretary of Labor and the Assistant Secretary for Occupational Safety and Health.[1] Because ABC and CITA

---

[1] Respondent CITA consists of a coalition of the following construction industry trade association representing over 200,000 member employers: The National Association of Home Builders, American Subcontractors Association, Amer-

generally support the Petitioners' position, this brief is being submitted on the date due for filing of the Petitioners' brief on the merits pursuant to Supreme Court Rule 19.6. Respondents ABC and CITA hereby adopt the Statement of the Case set forth in Petitioners' brief, except to add certain facts necessary for an understanding of Respondents' role and interest in this case.

Respondents ABC and CITA both intervened below in opposition to the Motion for Further Relief filed by the United Steelworkers of America, which was ruled upon by the Court of Appeals in *United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988), *rehearing denied* (Nov. 28, 1988); Pet. App. 1a. Together with the present governmental Petitioners, ABC and CITA argued that the Court of Appeals lacked authority to review OMB's disapproval of portions of the revised Hazard Communication Standard. ABC and CITA also argued to the court below that the plain language of the Paperwork Reduction Act as well as that statute's legislative history authorized OMB to disapprove the information collection requirements at issue in the case and that the court should not interfere with

---

ican Fire Sprinkler Association, Associated Specialty Contractors, Association of the Wall & Ceiling Industries-International, Insulation Contractors Association of America, Mason Contractors Association of America, Mechanical Contractors Association of America, National Association of Cold Storage Contractors, National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Glass Association, National Insulation Contractors Association, National Roofing Contractors Association, National Utility Contractors Association, Painting and Decorating Contractors of America, and the Sheetmetal and Air Conditioning Contractors National Association.

OMB's lawful disapproval of OSHA's burdensome and unnecessary requirements.

Following the Court of Appeals' adverse decision, in which it invalidated OMB's disapproval of the revised HCS, ABC and CITA filed their own Petition for Writ of Certiorari with this Court. *Associated Builders and Contractors, Inc. v. OSHA*, Docket No. 88-1075. That petition remains pending before the Court and raises the identical issue presented in the government's petition now under review. The ABC petition further challenges the Court of Appeals' decision in the related case of *Associated Builders and Contractors v. Brock*, 862 F.2d 63 (3d Cir. 1988), in which the Court of Appeals upheld the revised Hazard Communication Standard in its entirety.

As is further discussed below, the employer members of ABC and CITA are directly and adversely affected by the burdensome paperwork requirements of the revised Hazard Communication Standard which OMB properly disapproved. That disapproval should be reinstated, and the Court of Appeals' order should be reversed, in order to fulfill the mandate of the Paperwork Reduction Act and avoid imposing unnecessary paperwork burdens on construction industry employers.

The construction industry is most concerned about the paperwork burdens created by two of the three disapproved provisions. These are: (1) OSHA's requirement that Material Safety Data Sheets (MSDSs) be compiled and maintained at multi-employer worksites for exchange among myriad, often unidentifiable employers; and (2) OSHA's failure to exempt from the HCS all consumer products which are excluded from the definition of "hazardous chem-

icals" under the Superfund Amendment and Reauthorization Act of 1986.

As noted by OMB in its disapproval of the multi-employer worksite MSDS requirements, the revised HCS requires large numbers of MSDSs to be compiled and maintained by employers at all multi-employer worksites so that the MSDSs can be made available or exchanged with other employers at the site.[2] OMB received evidence and properly found that MSDSs were of "little, if any, practical utility" in such situations because "neither employers nor employees can predict what, where or when exposures are likely to occur or consult the MSDS before deciding how to handle the substance." Pet. App. 30a.

OMB also found reason to question OSHA's estimates of the number of MSDSs which would be required under the multi-employer worksite provision. OMB received evidence, not considered by OSHA, that the number of MSDSs required at construction industry sites would be a "minimum of several file cabinets" and might be "physically impossible." Pet. App. 32a.[3]

[2] The actual disapproved provision on multi-employer worksites in the revised HCS reads as follows:

> (2) Multi-employer workplaces. Employers who produce, use or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example employees of a construction contractor working on-site) shall additionally ensure the hazard communication programs developed and implemented under this paragraph (e) include the following: (i) The methods the employer will use to provide the other employer(s) with a copy of the material safety data sheet or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s) employees may be exposed to while working.
>
> * * * *

Jt. App. 21-22.

Accordingly, OMB disapproved "the requirement to bring MSDSs onto multi-employer worksites." Pet. App. 32a.[4] OMB left intact OSHA's labeling and training requirements and further upheld OSHA's requirement that employers "inform other employers of any precautionary measures that need to be taken to protect employees. . . ." Pet. App. 33a. Beyond these provisions, however, OMB found that OSHA had made no showing that the additional paperwork involved in the multi-employer MSDS provision would serve any safety-related objective.

With regard to the revised HCS's coverage of consumer products, OMB found that the standard would require employees to maintain records on "large numbers of consumer products for which MSDSs would have little practical utility, and for which the burden of compliance would be substantial." Pet. App. 33a.[5] OMB found that existing labeling already required on consumer products would identify any hazards re-

[3] OSHA did not receive this evidence because it issued the revised HCS, containing the new multi-employer worksite requirements, without first allowing any comments on this significant provision. *See* Petition for Writ of Certiorari in *ABC v. OSHA*, 88-1075 (cert. pending).

[4] Thus, contrary to the finding of the court below, the multi-employer worksite provision disapproved by OMB was not a mere "exchange" requirement which, according to the court, compelled employers "not to compile, but simply to transmit information." Pet. App. 9a-10a.

[5] Again, the Court of Appeals mischaracterized the provision being disapproved by OMB, incorrectly referring to the consumer product provision as a "labeling exemption." Pet. App. 9a.

quired and found no evidence that MSDSs would "have practical utility beyond the information already on the label." *Id.*

OMB also noted the excessive burden imposed by OSHA on employers to demonstrate that workplace exposures from consumer products are the same as "normal consumer use," in order to meet the criteria for exemption. OMB found that needless MSDSs would be received by employers from upstream suppliers who could not tell how their consumer products would ultimately be used. Finally, OMB heard evidence that the number of MSDSs involved would far exceed OSHA's estimates. Pet. App. 35a.

Accordingly, OMB disapproved OSHA's requirement that MSDSs be compiled and maintained on any consumer product excluded by Congress from the definition of "hazardous chemical" under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986. Pet. App. 35a.[6] The effect of this disapproval was to make the revised HCS consistent with other statutory treatments of consumer products and to allow employers to better focus their paperwork and hazard communication efforts on substances which represent *genuine* hazards in the workplace.[7]

---

[6] SARA exempts "any substance to the extent that it is used for personal, family, or household purposes, or is present [in the workplace] in the same form and concentration as a product packaged for distribution and use by the general public." 42 U.S.C. § 11021(e)(3).

[7] In their Opposition to the Petition for Writ of Certiorari, at 7-9, the Steelworkers have sought to challenge the merits of OMB's disapproval order by relying on a subsequent Notice of Proposed Rulemaking issued by OSHA. This Notice is not properly part of the record in this case and was not considered by the court below. In any event, OSHA merely used the Notice to solicit comments on the OMB disapproval, along with other aspects of the HCS, and did not "reject" OMB's conclusions, contrary to the Steelworkers' contention. Opp. at 7. Also, many of the comments subsequently received by OSHA provided compelling additional support for OMB's disapproval. *See, e.g.*, Comments of the Construction Industry Hazard Communication Coalition, OSHA Docket No. H-022D, Oct. 28, 1988.

SUMMARY OF ARGUMENT

The Court should reverse the judgment of the court below in order to give effect to OMB's statutory authority to reduce federal paperwork burdens. Pursuant to the Paperwork Reduction Act, Congress clearly delegated paramount responsibility for paperwork oversight and control to OMB. OMB properly exercised its authority in the present case by disapproving three burdensome and unnecessary record-keeping requirements contained in OSHA's revised Hazard Communication Standard. OMB reasonably concluded, on the basis of the evidence it received, that the three disapproved provisions had "little, if any, practical utility" and were not "the least burdensome necessary" to achieve OSHA's announced regulatory objectives.

At the outset, the Court should find that the Court of Appeals lacked jurisdiction to review OMB's disapproval of OSHA's information collection requirements in the context of the Steelworkers' Motion for Further Relief. OMB's disapproval pertained to entirely new regulations which had never previously been before the court. The Steelworkers should have been required to pursue their challenge to OMB's disapproval in a separate proceeding in U.S. district court.

The court below committed further error by misconstruing the statutory coverage of the PRA, which clearly authorizes OMB to review and disapprove "reporting or recordkeeping requirements, collection of information requirements, or other similar methods calling for the collection of information." The statutory definition, as confirmed by explicit legislative history, clearly applies to information collected for disclosure to the public, including the MSDSs required to be compiled and maintained by the revised Hazard Communication Standard. The court also misconstrued the terms of OMB's disapproval order, and incorrectly referred to the disapproved provisions as mere "labeling exemptions" and "transmittal requirements."

Finally, contrary to the holding of the Court of Appeals, Congress clearly recognized the supremacy of OMB over other federal agencies with regard to all paperwork requirements. The court's attempt to establish a broad "substantive rulemaking" exception to the Paperwork Reduction Act would substantially curtail OMB's authority and run contrary to Congressional intent. In any event, nothing in OMB's disapproval order has interfered with the "substantive policies and programs" of OSHA with regard to hazard communication. OMB has properly carried out its statutory mandate to "determine whether the collection of information by any agency is necessary for the proper performance of the functions of the agency." Therefore, the decision of the court below should be reversed and OMB's disapproval of selected provisions of the revised Hazard Communication Standard should be given effect.

ARGUMENT

I. OMB, WHICH HAS BEEN GIVEN BROAD PAPERWORK REDUCTION AUTHORITY BY CONGRESS, ACTED PROPERLY IN DISAPPROVING PORTIONS OF OSHA'S REVISED HCS.

At issue in this case is whether the Congressional objective of reducing the burden of federally mandated recordkeeping and reporting requirements will be permitted to become a reality. That goal can only be achieved by upholding the statutory authority of OMB to review and disapprove burdensome and unnecessary paperwork requirements imposed by federal agencies. Contrary to the holdings of the court below, both the plain language of the Paperwork Reduction Act and the expressed intent of Congress fully support OMB's exercise of its authority in the present case. Absent reversal by this court, OMB's authority to control the Federal paperwork burden will be eviscerated, and the burdensome and unnecessary recordkeeping required under the revised Hazard Communication Standard will unlawfully remain in effect.

Under the Paperwork Reduction Act, the Director of OMB has been charged with the responsibility of ensuring that rules and regulations are developed by other federal agencies in a manner which will, to the extent practicable and appropriate, minimize the information collection burden on the private sector. *See* 44 USC § 3504. Indeed, one of the most significant departures from the prior Federal Reports Act embodied in the PRA was the centralization of paperwork reduction authority in OMB. The need for this centralized approach was established by the report of the Commission on Federal Paperwork in 1977. This report estimated that federal paperwork require-

ments imposed annual costs of $25-$35 billion on private industry and $8.7 billion on individuals. *See Final Summary Report of the Commission on Federal Paperwork* 5 (1977).

For this reason, Congress in the PRA ordered federal agencies "not to conduct or sponsor the collection of information unless, . . . (3) the Director has approved the proposed information collection request. . . ." 44 U.S.C. § 3507(a). Congress further directed that OMB's function of clearing information collection requests should include a determination as to whether a request "is necessary for the proper performance of the functions of the agency," as well as whether the information "will have practical utility. . . ." 44 U.S.C. § 3504(c)(2). Thus, contrary to the entire thrust of the decision of the court below, OMB has been given broad authority to carry out the objectives of the Paperwork Reduction Act, and the agency is entitled to due deference on paperwork reduction issues, both from other federal agencies and the courts.

OMB's appropriate role in reducing the federal paperwork burden is well exemplified by its actions in the present case, in which it quite properly disapproved three burdensome and unnecessary recordkeeping requirements of the revised Hazard Communication Standard. Without delaying implementation of the final rule or otherwise interfering with the regulatory schedule imposed by the Court of Appeals, OMB conducted hearings and received evidence from both OSHA and affected parties. On the basis of this record, OMB reasonably concluded that the three disapproved provisions had "little, if any, practical utility" and did not appear to be "the least burdensome necessary." *See* Pet. App. 24a-25a. Under these circumstances, OMB was completely justified in disapproving the three provisions of the revised Hazard Communication Standard relating to centralized maintenance of MSDSs on multi-employer worksites, overly broad coverage of consumer products, and overly broad coverage of regulated drugs.

As it further discussed below, the Court of Appeals improperly reached out to address the PRA issue, which was not properly before it. The court then decided the issue improperly by misconstruing the plain language of OMB's statutory authorization, by misstating the terms of OMB's order, and by seeking improperly to render OMB subservient to the agencies whose recordkeeping requirements Congress intended OMB to control. For each of these reasons, the order of the court below should be set aside so that OMB's disapproval of the three provisions of the revised HCS will be reinstated.

II. THE COURT OF APPEALS LACKED AUTHORITY TO REVIEW OMB'S ORDER IN THE CONTEXT OF THE USWA'S MOTION FOR FURTHER RELIEF.

At the outset, the order of the court below should be reversed because the court lacked jurisdiction to review OMB's disapproval of OSHA's information collection requests. As noted in the government's Petition, at 20, the sole basis for the Court of Appeals' exercise of jurisdiction in this case was to determine whether the Secretary of Labor had complied with the court's previous order requiring the Secretary to extend its Hazard Communication Standard from the manufacturing sector to the non-

manufacturing sector. *United Steelworkers of America v. Pendergrass (USWA II)*, 819 F.2d 1263 (3d Cir. 1987). The court's previous order had said nothing at all about OSHA's compliance with the Paperwork Reduction Act, and this issue had never been placed before it. The court's previous order certainly did not prohibit PRA review and in fact, the initial manufacturing-sector Hazard Communication Standard *had* been submitted to OMB.

The provisions of the revised standard which OMB ultimately disapproved were entirely new. They had not been part of the courts' previous order requiring expansion of the Hazard Communication Standard to non-manufacturing industries. Accordingly, there was no basis for the court to reach the question of whether OMB's disapproval of these new provisions was proper under the Paperwork Reduction Act.

Perhaps more fundamentally, it is clear that direct review of an OMB disapproval of agency information collection requests under the PRA lies in a U.S. district court, not a court of appeals. 28 U.S.C. § 1331; 5 U.S.C. § 702. *See Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen*, 846 F.2d 1449 (D.C. Cir. 1988), *petition for cert. pending*, No. 88-849. *See also Maryland Department of Human Resources v. Department of Health and Human Services*, 763 F.2d 1441, 1445 (D.C. Cir. 1985), *citing Bell v. New Jersey*, 461 U.S. 773, 778, n.3 (1983). As these cases make clear, neither the PRA nor the Administrative Procedure Act authorizes direct review of OMB's actions in the courts of appeals. *See also*, K. Davis, 4 *Administrative Law Treatise* 130 (2d Ed. 1983).

The Court of Appeals' reliance on the All-Writs Act, 28 U.S.C. § 1651, is misplaced. That statute

cannot be used to expand an appellate court's jurisdiction. As this Court held in *Pennsylvania Bureau of Correction v. United Marshals Service*, 474 U.S. 34, 43 (1985).

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

See also General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982). It is also well settled that relief under the All-Writs Act is not available unless the applicant has shown that he has no other adequate remedy. *See In re Chicago, R.I. & P. Ry.*, 255 U.S. 273 (1921); *In re Montes*, 677 F.2d 415, 416 (5th Cir. 1982).

Here, when the Steelworkers sought to challenge OMB's disapproval of OSHA paperwork requirements, the union raised issues which had never before been considered by the appellate court and were beyond its jurisdiction. Moreover, an existing statutory framework existed by which the Steelworkers could have obtained review of the OMB order in a U.S. district court under 28 U.S.C. § 1331 and the APA. Accordingly, the Court of Appeals should have directed the Steelworkers to pursue their claims in a separate proceeding in U.S. district court. The court had no authority to overturn OMB's disapproval under the guise of effectuating the court's own prior orders, which had been based upon entirely separate

legal issues. *See also Freeport Minerals Company v. United States*, 758 F.2d 629, 636 (Fed. Cir. 1985), finding no judicial authority "to assume control over an agency case, once that case has come to it for judicial review, and retain control over it regardless of the statutes which the agency must follow."

III. THE DISAPPROVED PROVISIONS OF THE REVISED HCS CLEARLY CONSTITUTE "COLLECTION OF INFORMATION" AND "INFORMATION COLLECTION" REQUIREMENTS WITHIN THE MEANING OF THE PRA, THEREBY AUTHORIZING OMB REVIEW.

The PRA directs OMB to review and approve or disapprove all federal "information collection requests", a term which is defined as including any "written report form, application form, schedule, questionnaire, *reporting or recordkeeping requirement, collection of information requirement or other similar method calling for the collection of information.* 44 U.S.C. § 3502 (11) (emphasis added). The Act further defines the "collection of information" to include the obtaining or soliciting of facts or opinions by an agency through the use of . . . *reporting or recordkeeping requirements or other similar methods.*" 44 U.S.C. § 3502(4) (emphasis added). Finally, the term "recordkeeping requirement" is defined in the Act as "a requirement imposed by an agency on persons to *maintain specified records.*" 44 U.S.C. § 3502(17) (emphasis added).

Nothing in the PRA restricts the Act's coverage to "paperwork required by the federal government for its own regulatory or statistical purposes," as contended by the court below. Pet. App. 10a. Rather, the legislative history explicitly refers to information collected for disclosure to the public in addition to information submitted to the government. Thus, in

response to statements by the Securities and Exchange Commission that the Act's definition should be limited to "collection for statistical purposes" as opposed to "review of disclosure of enforcement-related information gathering,", the House Report on the PRA stated:

> The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements.

H.R. Rep. No. 835, 96th Cong., 2nd Sess., 23 (1980).

The Senate report reaffirmed this legislative intent as follows:

> Information is also collected to form the basis for disclosure to the public. * * * In this connection, federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction."

S. Rep. No. 930 96th Cong., 2nd Sess. 39-40 (1980). So that this point could not possibly be misunderstood, the Senate Report further stated that the definition of "recordkeeping requirement" included "information maintained by persons which *may be but is not necessarily provided to a Federal agency.*" *Id.* at 40 (emphasis added).

Consistent with this legislative intent, OMB has issued regulations which interpret the Act as applying to any agency demand that persons "obtain, maintain, retain, report or publicly disclose information". 5 C.F.R. § 1320.7(c). OMB has also long held that a reporting requirement can include an agency demand that a person "provide information to another person". 5 C.F.R. § 1320.7(s). Similarly, OMB's regulations state that a recordkeeping requirement can include a requirement "that information be maintained or retained by persons but not necessarily provided to the agency." 5 C.F.R. 1320.7(r). All of these regulations were ignored by the court below, and the court thereby committed further clear error by failing to give deference to OMB's interpretation of its own governing statute. *See K-Mart Corp. v. Cartier, Inc.*, 56 U.S.L.W. 4478 (1988); *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 842-843 (1984).

As noted by Petitioners, the only other Court to review the statutory term "collection of information" reached a result opposite to that of the Third Circuit. In *Action Alliance of Senior Citizens v. Bowen*, 846 F.2d 1449, the District of Columbia Circuit stated: "OMB . . . ha[s] interpreted the statutory term "collection of information" for nearly half a century to encompass "any general or specific requirement for the establishment or maintenance of records . . . which are to be used or be available for use in the collection of information."

In light of this statutory language, the expressed congressional intent, and the longstanding interpretation of the responsible agency, it was clearly erroneous for the court below to hold that the provisions of the HCS at issue here were not subject

to OMB under the PRA. Therefore, the court's holding must be set aside.

The court's conclusion was further undermined by its apparent misunderstanding of the actual HCS provisions which OMB disapproved. Thus, with regard to the revised Standard's coverage of consumer products and regulated drugs, the court below mischaracterized the disapproved provisions as mere "labeling" exemptions. Pet. App. 91. As noted above, the actual issue presented to OMB was OSHA's failure to fully exempt consumer products from the *full coverage* of the non-manufacturing HCS, most notably, from the paperwork requirements connected with MSDSs. As OMB held, it is the presence of statutorily mandated labels on consumer products which in part renders MSDSs unnecessary. Clearly, OSHA's failure to relieve non-manufacturing employers of the duty to compile and maintain MSDSs on vast numbers of consumer products constituted a "recordkeeping requirement" within OMB's review authority under the plain language of the Act.

The court below also mischaracterized the disapproved multi-employer worksite provision. The court claimed that OSHA had merely required the "transmittal" of information, Pet. App. 9a, when in fact what OMB disapproved was OSHA's requirement that MSDSs be "brought onto" multi-employer jobsites. Pet. App. 32a. The physical act of compiling and maintaining large quantities of MSDS paperwork at multiple job sites in the construction industry, regardless of who originally prepares the forms, clearly constitutes a "recordkeeping requirement" within the meaning of the Act.

Of course, even a "transmittal" of information is covered by the PRA when, in order to transmit the

information, records must first be compiled and maintained. That is clearly the case here. Therefore, the court's erroneous reading of the multi-employer worksite provision must be set aside and OMB's disapproval of this provision should be reinstated.

IV. THE COURT OF APPEALS ERRONEOUSLY HELD THAT OMB'S DISAPPROVAL OF THE REVISED HCS CONSTITUTED UNLAWFUL INTERFERENCE WITH OSHA'S "SUBSTANTIVE RULEMAKING AUTHORITY."

The court below committed further error by contending that its invalidation of OMB's order was "reinforced" by statutory language in the PRA which supposedly "disaffirms the intention to grant substantive lawmaking authority to OMB." Pet. App. 11a. The court's citations to sections 3504(a) and 3518(e) of the Act improperly removed those provisions from their statutory context. These provisions simply recognize that an agency retains authority to determine its regulatory objectives, while OMB has the responsibility to review whether the agency has chosen the least burdensome information collection methods to achieve those objectives. The court below ignored § 3518(a) of the Act which states that "the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for federal information activities *is subject to the authority conferred on the director by this chapter.*" (emphasis added).

The Court of Appeals' misreading of Congress's intent on this issue is perhaps best exemplified by the court's statement that "OMB cannot in the guise of reducing paperwork substitute its judgment for that of the agency having substantive rulemaking responsibility for such matters as drug or food labeling

drug package inserts, proxy statement disclosures, or the contents of registration statements." Pet. App. 11a. To the contrary, as discussed at the outset of this brief, Congress deliberately enpowered OMB to "substitute its judgment" for that of any agency with regard to the imposition of *paperwork burdens* on private businesses or individuals. 44 U.S.C. § 3504, 3507. Clearly, as to paperwork reduction matters only, OMB's authority was intended to supersede that of OSHA or other regulatory agencies.

The court's attempts to carve out a broad "substantive rulemaking" exception to the PRA would drastically reduce OMB's authority and render it unable to control the flow of paperwork requirements emanating from the various federal agencies. This is clearly evidenced by the examples, cited without authority by the court below, in which the court would deny OMB the authority to reduce the paperwork burden on the private sector. The court's erroneous assertion that OMB should be foreclosed from reviewing proxy statement disclosure requirements is particularly egregious in view of the explicit statements in favor of such review by both Congressional committees referred to above.

In any event, nothing in OMB's disapproval order has interfered with the "substantive policies and programs" of OSHA with regard to Hazard Communication. OSHA has never made any showing that requiring employers to maintain and/or exchange MSDSs at multi-employer worksites, as opposed to providing access to such information upon request, is necessary to increase worker safety in any way. Nor has OSHA made such a showing in connection with its proposed coverage of consumer products, which are already extensively regulated both in and out of the workplace.

OMB's review of the revised HCS was properly directed to whether OSHA's recordkeeping requirements would have practical utility. OMB did not mandate any particular method by which OSHA would be required to achieve its announced regulatory objective. OMB permitted OSHA an opportunity for additional rulemaking to provide further evidence as to why OSHA's preferred provisions were necessary. Thus, OMB has not usurped OSHA's substantive policymaking function in any way, but has simply carried out its own statutory mandate to "determine whether the collection of information by any agency is necessary for the proper performance of the functions of the agency. . . ." 44 U.S.C. § 3504 (c)(2). OMB's exercise of its statutory authority should be upheld and the Court of Appeals' decision should be set aside.

CONCLUSION

For the reasons set forth above and in the government's Petition, the decision of the court below should be reversed and OMB's disapproval of the provisions of the revised Hazard Communication Standard should be given effect.

Respectfully submitted,

GARY KOMAROW
Senior Staff Counsel
National Association of Home Builders
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0200

MAURICE BASKIN *
VENABLE, BAETJER, HOWARD & CIVILETTI
1201 Pennsylvania Avenue, N.W.
Suite 1200
Washington, D.C. 20004
(202) 662-4300
General Counsel of Respondent ABC and Counsel to Respondent CITA

* Counsel of Record

Date: June 29, 1989